No. 96-110

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1996

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE,
Attorney General of Washington,
Petitioners/Defendants,

v.

HAROLD GLUCKSBERG, M.D.,
ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D.,
and PETER SHALIT, M.D., Ph.D.,
Respondents/Plaintiffs.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. RESPONDENTS' ATTEMPTS TO EXPLAIN AWAY CLEAR CONFLICTS BETWEEN THE DECISION BELOW AND THOSE OF OTHER FEDERAL AND STATE COURTS ARE FACILE, BUT INEFFECTIVE

Plaintiffs argue that no conflict exists between the unprecedented decision below and the decisions of both federal and state appellate courts that have reached a different conclusion than did the Ninth Circuit. Opp'n at 5-9. They are wrong.

A. The Second Circuit Conflict

The Ninth Circuit concluded below that mentally competent, terminally ill patients have interests under the Due Process Clause that include physician assistance in ending their lives. App. A-116. As pointed out in the Petition, the Second Circuit has explicitly rejected this conclusion.

> "The right to assisted suicide finds no cognizable basis in the Constitution's language or design, even in the very limited cases of those competent persons who, in the final stages of terminal illness, seek the right to hasten death."

Quill v. Vacco, 80 F.3d 716, 724-25 (2d Cir. 1996), *petition for cert. docketed*, 65 U.S.L.W. 3052 (May 16, 1996) (No. 95-1858).

The Second Circuit's decision, issued 27 days *after* that of the Ninth Circuit, presents a direct conflict with the decision below. Contrary to Plaintiffs' argument, the conflict is not lessened by the fact that the Second Circuit developed a different approach—under the Equal Protection

Clause—as a basis to strike down New York statutes prohibiting assisted suicide.[1]

Nor is the conflict lessened by the Second Circuit's recognition that this Court's prior opinions, combined with the Second Circuit's "position in the judicial hierarchy", dictated that it "be even more reluctant than the [Supreme] Court to undertake an expansive approach in this unchartered area". *Quill*, 80 F.3d at 725.

The Ninth Circuit, of course, showed no such reluctance. The decision below is broad in both language and import, creating a new approach to liberty interest analysis under the Due Process Clause and imposing new limitations on state legislative discretion in making public policy decisions. Notwithstanding the similarity of result reached by the two panels, their approaches present a significant conflict, one only this Court can resolve.

B. The Michigan Supreme Court Conflict

Plaintiffs do not deny that the decision below conflicts with that of the Michigan Supreme Court in *People v. Kevorkian*, 447 Mich. 436, 527 N.W.2d 714 (1994), *cert. denied* 115 S. Ct. 1795 (1995). Rather, they claim that the conflict has "evaporated" because "the statute reviewed by the Michigan Supreme Court has since expired by its own terms". Opp'n at 8. An examination of the *Kevorkian* opinion reveals that Plaintiffs' argument is without merit.

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[1] The diversity of approaches taken by the Second and Ninth Circuits to get to similar results doesn't necessarily strengthen either court's decision. "The fact that the courts could not even agree on which part of the constitution creates the 'right to die' exposes the shaky basis of both arguments." *A faint message from the founders*, The Economist, April 20, 1996, at 19.

The Michigan Supreme Court opinion addressed four cases. Three of the four involved a time-limited statute specifically prohibiting assisted suicide; two of those three were appeals of dismissed indictments naming Dr. Jack Kevorkian, and the third was a declaratory judgment challenge to the statute on both state and federal grounds.

Michigan, unlike most states, did not have a statute specifically prohibiting assisted suicide until late 1992. The Michigan Legislature passed legislation[2] including such a prohibition and establishing a commission to study the issue. The statute, including the specific prohibition, expired six months after the commission issued its recommendations. All three cases challenging this statute included an argument that the statute violated the Michigan Constitution because it included multiple subjects. The Michigan Supreme Court rejected this argument. 447 Mich. at 463.

The Michigan Supreme Court also considered—and rejected—the same arguments advanced in the instant case, that such a statute violates the Due Process and Equal Protection Clauses:

> "We conclude [that] the United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in committing suicide."

447 Mich. at 446.

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[2] 1992 Mich Pub. Acts 270, adopted December 15, 1992, effective March 31, 1993, codified as Mich. Comp. Laws § 752.1027. The law was subsequently amended to become effective February 25, 1993. 1993 Mich. Pub. Acts 3. *See People v. Kevorkian*, 447 Mich. 436, 450-53, 527 N.W.2d 714 (1994), *cert. denied* 115 S. Ct. 1795 (1995).

The fourth case resolved by the Michigan Supreme Court opinion in *Kevorkian* was an appeal from a murder indictment involving conduct that occurred before the specific assisted suicide statute had become effective. The defendant—again Dr. Kevorkian—had been charged with murder under the authority of *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920), which held that assisting a suicide could be charged as a form of murder. The issue in this fourth case was whether assisting a suicide was a crime even without a specific statute.

The Michigan Supreme Court, noting the evolution of the "interpretation of causation in criminal cases" (447 Mich. at 493), overruled *People v. Roberts* "to the extent that it can be read to support the view that the common-law definition of murder encompasses the act of intentionally providing the means by which a person commits suicide". 447 Mich at 494.

However, the Michigan Court also held that assisted suicide continued to be a crime in Michigan:

> "[E]ven absent a statute that specifically proscribes assisted suicide, prosecution and punishment for assisting in a suicide would not be precluded. Rather, such conduct may be prosecuted as a separate common-law offense under [Michigan's common law] saving[s] clause of [Mich. Comp. Laws] § 750.505".

447 Mich. at 495.[3]

Any fair reading of the *Kevorkian* opinion makes it clear that the Michigan Supreme Court concluded that (1) Michigan has a law remaining in effect imposing criminal penalties for assisting a suicide and (2) such laws do not violate the Fourteenth Amendment.[4] This latter conclusion is directly in conflict with the decision below. Plaintiffs' argument that the conflict has somehow "evaporated" because assisting a suicide is today punishable under a different statute is, at best, sophistry.

Plaintiffs also attempt to distinguish the Michigan cases because their central actor—Dr. Jack Kevorkian—has

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[3] Mich. Comp. Laws § 750.505 reads as follows:

> "Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court."

[4] Any doubts that these two conclusions remain the law in Michigan dissolve in light of the *Kevorkian* Court's observation that

> "[w]hen a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but it is a judicial act of the Court which it will thereafter recognize as a binding decision."

444 Mich. at 487 n.65 (quotations and citations omitted). The Michigan Supreme Court's rejection of a constitutional right to assisted suicide was clearly "germane" to its decision that assisted suicide is punishable as a common law crime. Thus, under this principle, the Court's holding in *Kevorkian* continues to be the law in Michigan, and the conflict with the decision below remains.

not limited his "assistance in the deaths of patients . . . either to mentally competent or to terminally ill patients, much less patients who are both mentally competent and terminally ill". Opp'n at 8.[5]

This argument ignores the fact that the *legal* arguments advanced by Dr. Kevorkian and his supporters to the Michigan Supreme Court—and rejected by that Court—were essentially the same as those advanced by Plaintiffs to the courts below. Indeed, the Court explicitly rejected the reasoning of the District Court ruling that was upheld by the Ninth Circuit limited *en banc* panel. *See generally* 447 Mich. at 469-81.

Moreover, a finding of a constitutional right to assisted suicide arguably cloaks at least some of Dr. Kevorkian's actions with the mantle of constitutional protection. His apparent unwillingness to limit his activities to mentally competent, terminally ill individuals demonstrates the difficulty—if not the impossibility—of limiting the new constitutional right created by the Court below to such individuals as well. If anything, Dr. Kevorkian's activities illustrate in very real terms the need for this Court to determine whether a State's ability to regulate such activities is limited by the Constitution.

C. Conflicts With Other Courts

Plaintiffs do not deny that the Ninth Circuit's explicit holding also conflicts with at least one other state court decision, or that its implicit holding diverges from

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[5] It is not clear that Dr. Kevorkian would agree with Plaintiffs' characterization. He recently filed a petition with this Court seeking a writ of certiorari in which he argues, *inter alia*, that "the Due Process Clause encompass[es] the right of a mentally competent, suffering adult to hasten their [sic] own death". Petition for Writ of Certiorari, *Kevorkian v. Michigan*, Case No. 96-135, p. 6.

that of almost every other court that has considered the issue. *See* Petition at 21 n.84, 25-26.

Rather, they contend that the cases cited in the petition are either distinguishable or not "worthy of this Court's attention". Opp'n at 7-8 n.7. Contrary to Plaintiffs' contention, these cases demonstrate just how far from the mainstream of judicial thought the decision below has strayed. The Ninth Circuit is not merely the first court to rule as it did—it is the only appellate court, federal or state, to do so.

Even the Ninth Circuit acknowledged that its decision was a "step beyond what the courts have previously approved". Pet. App. A-8. This Court should accept review to determine whether the Ninth Circuit has indeed gone a step too far.

II. THE TIME FOR THIS COURT TO DETERMINE WHETHER THERE IS A CONSTITUTIONAL RIGHT TO ASSISTED SUICIDE IS NOW

Plaintiffs argue that this Court should decline certiorari "until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem". Opp'n at 9 (quotations and citations omitted). They acknowledge that denial of review "would suggest no expression of the merits" of the decision below. Opp'n at 10 n.8. It would simply leave the question open for resolution on another day.

However, as demonstrated in the Petition, this case presents important issues of public policy potentially affecting every person and issues of federalism certainly affecting every state legislature. These issues cry out for a definitive resolution, a resolution only this Court can give.

Plaintiffs have previously acknowledged the significance of this case. After the panel decision rejected their arguments (*Compassion in Dying* I, Pet. App. D), Plaintiffs argued that the issues in this case "are of exceptional importance [raising] significant federal questions of first impression that are likely to reoccur". Pet. for Reh'g, Suggestions for Reh'g *En Banc* at 9. The issues are no less important, and no less in need of resolution, because Plaintiffs happen to have prevailed in the latest round.

The Court below, with uncharacteristic understatement, recognized that its decision "leaves unresolved a large number of . . . troublesome issues that will require resolution in the years ahead". Pet. App. A-116.

The questions left open by the decision below include at least these:

- The definition of terminal illness for purposes of exercising this newly created right;
- Whether the newly created right is or can be limited to the terminally ill;
- The procedural limitations, if any, a State may establish to determine whether an individual is in fact terminally ill;
- Whether the newly created right is or can be limited to the mentally competent;
- The standard for determining mental competence for the purpose of exercising this new right;

- The procedural limitations, if any, a State may establish to determine whether an individual is in fact mentally competent;
- The procedural limitations, if any, a State may establish to determine that an individual's decision to commit suicide is in fact voluntary;
- Whether the newly created right is limited to physician prescription of medications or may also include a right to physician administration of medications or to assistance involving neither physicians nor medications.

Were Plaintiffs' approach adopted, the next several years would see a vast expenditure of legislative and judicial energies devoted to answering these and related questions. Then, at some future point, this Court would decide whether the alleged right really exists and whether all this activity was necessary in the first place. Plaintiffs' suggestion that such an approach serves "[s]ound principles of judicial restraint" can most charitably be described as disingenuous.

Petitioners agree that it would have been best not to inject the judiciary into the hotly debated policy question of whether some form of physician assisted suicide should be allowed. However, Plaintiffs' decision to move the debate to the courtroom, coupled with the Ninth Circuit's willingness to become the central decision-maker, require this Court to likewise become involved, at least to determine whether this hotly debated social policy question has but one constitutionally compelled answer.

III. CONCLUSION

For these reasons, and the reasons set forth in the Petition for Writ of Certiorari and amicus briefs in support thereof, this Court should grant the Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted this 28th day of August, 1996.

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